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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-1027

POCONO INTERNATIONAL CORPORATION and CHARLES GOLDBERG,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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POCONO INTERNATIONAL CORPORATION and CHARLES GOLDBERG,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case, entered on November 26, 1975.

OPINIONS BELOW

The decision of the Court of Appeals below was rendered in an opinion by Mansfield, Circuit Judge, with Judges Timbers and Gurfein concurring (Appendix A, *infra*, 1a-19a). The opinion of the District Court below, denying post-trial motions, was rendered in an opinion by Brieant, District Judge (Appendix C, *infra*, 22a-31a). Neither court's opinion has as yet been reported.

JURISDICTION

The judgment of the court below was entered on November 26, 1975 (Appendix A, *infra*, 1a-19a). A timely petition for rehearing was denied on December 23, 1975 (Appendix B, *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether petitioners can be found to have committed a wilful criminal offense under the Interstate Land Sales Full Disclosure Act and subjected to imprisonment and fine for late registration with the Department of Housing and Urban Development of one tract of land, where petitioners had previously filed with HUD the required documents on two related tracts from the same development, and where independent agents engaged by petitioners were actively preparing the necessary documentation on the land in question during the brief period in which lots were sold.

II. Whether land developers can be convicted, under the Interstate Land Sales Full Disclosure Act or the federal mail

fraud statute, of fraudulent misrepresentations concerning the process for buyers to obtain approval of their on-site sewage disposal systems (a) where the alleged misrepresentation was an accurate recital of a letter to the developers from the local township supervisors, and (b) where the prosecution's theory that the township officials lacked the authority indicated in the letter was based upon a forced and deceptive interpretation of a vague regulation issued by a state administrative agency.

III. Whether, in prosecutions under the Interstate Land Sales Full Disclosure Act and the federal mail fraud statute, petitioners' convictions for multiple counts of fraudulent misrepresentation under each act can be sustained where, on the prosecution's own theory and the trial court's charge to the jury, the evidence was plainly insufficient.

IV. Whether petitioners' convictions for fraudulent misrepresentations in connection with sales of land, under the Interstate Land Sales Full Disclosure Act and the federal mail fraud statute, violate the Fifth Amendment due process guarantee that persons shall be given fair notice of possible criminal conduct where the basis for prosecution is a forced and deceptive interpretation of a vague administrative regulation of Pennsylvania's Department of Environmental Resources.

V. Whether the trial court permitted improperly a constructive amendment to the charges brought against petitioners in violation of the Fifth Amendment right to indictment by grand jury.

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CONSTITUTIONAL PROVISION, FEDERAL STATUTES AND STATE ADMINISTRATIVE REGULATIONS INVOLVED

I. United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

II. Federal Statutes:

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-1720, and the federal mail fraud statute, 18 U.S.C. §1341, are reproduced in Appendices D and E, *infra.*

III. Pennsylvania Department of Environmental Resources Regulations:

Relevant section of the regulations of the Pennsylvania Department of Environmental Resources is reproduced in Appendix F, *infra,* (56a-57a).

STATEMENT OF THE CASE

Preliminary Statement

Although the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-1720, was passed in 1968, this is the first case

under that statute to come before this Court. Remarkably it is a criminal prosecution rather than a civil proceeding, inasmuch as the main thrust of the Act is civil in nature. There are two defendants in this criminal proceeding who are petitioning for writ of certiorari from this Court. One petitioner is a corporation, Pocono International Corporation. The other is an individual, Charles Goldberg, who had a substantial stock interest in the corporation and served for a time as a corporate officer. The two defendants were tried and convicted on significantly different charges and evidence. Pursuant to Rule 23(5) of this Court, a single petition for certiorari is submitted covering both cases.

The individual petitioner, Charles Goldberg, was convicted of violating the Act's requirement that certain interstate land sellers must have an effective "statement of record" on file with the Department of Housing and Urban Development (HUD) before selling any lot. 15 U.S.C. §1703(a)(1). Trial was by jury in the United States District Court for the Southern District of New York (Brieant, D.J.). The jury returned verdicts of guilty on counts alleging sales of six lots, within a large subdivision, during a 78 day period before the "statement of record" became "effective." Thirty of those 78 days elapsed after the "statement" had been filed with HUD, but the "statement" did not become "effective" until the passage of a month from filing. For these six acts of late registration, Judge Brieant sentenced petitioner Goldberg to six concurrent prison terms of 18 months (A144).*

Petitioner Goldberg was also charged with fraud under two statutes: The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1703(a)(2), and the mail fraud statute, 18 U.S.C. §1341.

* Citations with the prefix "A" refer to the Joint Appendix in the court below. Citations with the prefix "Gov't Br." refer to the Government's Brief in the court below. Citations with the prefix "T" refer to the notes of testimony as transcribed.

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The allegations of fraudulent behavior were the same under both statutes. The jury returned guilty verdicts on seven counts under each act. Judge Brieant suspended imposition of sentence on all of the fraud counts and placed petitioner Goldberg on probation for four years (A145).

The corporate defendant was charged and convicted of the same offenses as was the individual defendant, *i.e.*, selling six lots during a 78 day period before the "statement of record" on file with HUD became "effective." Again, 30 of the 78 days elapsed after the "statement of record" had been filed and while it was pending in HUD. The same statutory provision in the Interstate Land Sales Full Disclosure Act that calls for registration of a "statement of record" with HUD also provides for delivery to prospective purchasers of a "property report." 15 U.S.C. §1703(a)(1). In three of the six sales involved, the corporate defendant alone was convicted of making sales before delivery to the customers of the required "property report"(A83).

The corporate defendant was also charged with fraudulent conduct under the Interstate Land Full Disclosure Act and the mail fraud statute. The corporation was found guilty in five of the six transactions involved in the late registration counts. The corporation was also found guilty in two other transactions.

Judge Brieant sentenced the corporate defendant to fines on each lot. The formula he used on seven transactions was $1,000 for each mail fraud count, $5,000 for each Land Sales Act fraud count, and $5,000 for each charge of late registration whether or not accompanied by the absence of the "property report." As to each transaction, Judge Brieant made the fines concurrent. On

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the eighth transaction, involving only late registration and absence of a "property report," Judge Brieant imposed a fine of $2,500. The sum of all the fines was $37,500 (A141-142).

Background of the Interstate Land Sales Full Disclosure Act

The heart of this case is the relatively new Interstate Land Sales Full Disclosure Act. As previously mentioned, the statute was enacted in 1968. This followed five years of congressional consideration of serious problems with respect to sales of useless and inaccessible land to purchasers, many of whom never saw the sites they agreed to buy for vastly inflated prices. See Hearings on Frauds and Quackery Affecting the Older Citizen Before the Senate Special Committee on Aging, 88th Cong., 1st Sess. (1963). The flavor of the egregious practices leading to the Act is described in a recent article:

> "Purchasers have unknowingly bought land in swamps, deserts, high arid plateaus, mountains, remote valleys, jungles, lava beds, flood plains, near faults, and on land that will not support a building. . . . On his first visit to his country acreage in New Mexico, a Denver man discovered that he was the proud owner of the face of a cliff." Schmidt, *Federal Regulation of Interstate Land Sales: The Limitations of Full Disclosure*, 11 Columbia J. of Law and Soc. Prob. 133, 135 (1975).

The same source notes widespread concern with the failure of developers to carry out promises to provide water, electricity,

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sewers and roads. Purchasers' plans and dreams for vacation sites, retirement homes, or speculative investments have been shattered.

The Interstate Land Sales Full Disclosure Act was enacted to meet these perceived grave abuses. As the title of the Act indicates, the basic scheme of the statute is to inform prospective buyers. The Act is modeled upon the full disclosure approach of the Securities Act of 1933. 15 U.S.C. §§77a-aa. This is accomplished through the registration with HUD of the developer's "statement of record" and delivery to potential purchasers of a "property report." Specification of the contents of the statement and report is the task of the Office of Interstate Land Sales Registration (OILSR) within HUD. The antifraud provision of the Land Sales Act employs language similar to that of Section 17 of the Securities Act.

The Interstate Land Sales Full Disclosure Act provides aggrieved purchasers with many rights. Under the statute, a purchaser has the power to declare a contract of sale void if he did not receive the "property report" before signing the contract. 15 U.S.C. §1703(b). If the "property report" was received within forty-eight hours before the purchaser signed the agreement, the purchaser may revoke the contract in the following forty-eight hours unless the purchaser inspected the lot to be purchased and acknowledged having made the inspection and understood the "property report." *Ibid.* (A 1974 amendment to the Act extends the power of revocation in the latter situation to three business days.) The Act also gives buyers alleging violations of the statute a cause of action for damages or equitable relief in federal or state courts. 15 U.S.C. §1709.

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Actions lie for untrue statements or omissions of material facts in either the "statement of record" or the "property report." Monetary recovery can extend to the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs.

In addition to the rights afforded to aggrieved purchasers, the Act authorizes the Secretary of Housing and Urban Development to take action whenever it appears that a person is engaged or is about to engage in any acts or practices that constitute violations of the statutes, or of any rule or regulation prescribed thereto. 15 U.S.C. §1714. The Secretary "may, in his discretion, bring an action in any district court of the United States, or the United States District Court for the District of Columbia to enjoin such acts or practices . . . ." *Id.* at (a). To aid in carrying out this responsibility, the Secretary has plenary investigative authority, including subpoena powers. *Id.* at (b)-(d). The Secretary has broad authority to issue rules and regulations and such orders as are necessary and appropriate. 15 U.S.C. §1718.

Provisions for criminal prosecution are attached to the civil powers of private actions and administrative enforcement. In the paragraph authorizing the Secretary to enforce the Act by injunctive remedy, the concluding sentence permits reference for criminal prosecution: "The Secretary may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the appropriate criminal proceedings under this chapter." 15 U.S.C. §1714(a). The definition of the crime is in 15 U.S.C. §1717 (Appendix D, *infra*, 52a).

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Administration of the Interstate Land Sales Full Disclosure Act

The history of HUD enforcement of the Interstate Land Sales Full Disclosure Act is well described in a recent study:

> "The ILSFDA became effective on April 30, 1969, but OILSR [Office of Interstate Land Sales Registration] was relatively inactive during its first three years. It is possible that OILSR concentrated its efforts on compelling developers to register . . . . On March 1, 1972, the Secretary of HUD indicated his dissatisfaction with OILSR by elevating it to an HUD primary organizational unit reporting directly to him, and appointing a new Administrator, who promptly announced a policy of strict enforcement . . . .
>
> OILSR's increased use of publicity, more frequent court actions and extensive searches of the nation have increased the number of registered developments. In March 1972, after three years of existence, OILSR had 3,000 registrations. Fourteen months later it had 5,000 with 20 to 25 more developers being identified each week . . . .
>
> OILSR hopes to increase the effective enforcement of the ILSFDA through the use of publicity. The prime purpose of the public hearings held in 17 cities during 1972 was to inform the public of their rights and duties under

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> the ILSFDA. The media provided extensive free coverage at OILSR's request in 16 of the 17 cities. . . . Whenever OILSR takes significant action against a developer, it strives for the widest publicity by issuing press releases and granting newspaper interviews. Such tactics are usually followed by an immediate surge in registrations and complaints from the region where the developer operated." Schmidt, *Federal Regulation of Intersate Land Sales: The Limitations of Full Disclosure,* 11 Columbia J. of Law and Soc. Prob. 133, 146-147, 149, 152 (1975).

Despite the actions taken by OILSR recounted in this article, there is still a large gap between the number of developments affected by the Act and the number of developers who have registered with HUD. "The Deputy Administrator of OILSR estimated that there are 5,600 developers in the United States, half of whom have failed to register." *Id.* at 149 n. 102. An October 1974 account, quoted in the same article, indicates that OILSR had then received 6,600 initial and consolidated registration statements, representing in the neighborhood of 3,400 subdivisions. *Ibid.*

The Origin of the Instant Case

The instant case had it genesis in the early years of the Interstate Land Sales Full Disclosure Act. Much of the history pre-dates the change in administrative enforcement that occurred in 1972. Pocono International Corporation (PIC) was

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incorporated in early 1970. Its purpose was to acquire, develop and subdivide approximately 820 acres of land in the Poconos Mountain area of Pennsylvania. The project, known as Hickory Run Forest, was divided into eleven sections for development in stages.

A. The Late Registration Charges

Two sections of Hickory Run Forest, not involved in the instant case directly, were readied for sale in 1971 and 1972. On these tracts, PIC engaged an attorney to handle the necessary compliance with the Interstate Land Sales Full Disclosure Act. A "statement of record" was filed with the Department of Housing and Urban Development on one section on May 20, 1971. It became "effective" under the Act a week later, on May 27, 1971. The second "statement of record" was filed on March 12, 1972 and became "effective" on May 10, 1972. A third tract of the land in Hickory Run Forest is involved in the present prosecution. PIC did not use the services of the attorney who had prepared the prior HUD filings. Instead, a real estate broker, Norman Failla, was assigned to take care of the federal registration. On the first two tracts, Failla had taken care of certain registrations required by New York and New Jersey (T106-113).

Primary requisites for a "statement of record" are a plot plan and related engineering data. PIC, through Goldberg, arranged for this work to be done by Ebeco Corporation, whose principal engineer on the job was Joseph Michel (T1058-1059). Ebeco began work in March 1972 (T407-408). Goldberg obtained maps for Failla and arranged for other needed

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documents to be supplied to Failla by other contractors engaged by PIC (T113-117). The check for the HUD filing fee was given to Failla by Goldberg, who also arranged for the signing of the registration by the president of PIC (T360-361).

While Failla was compiling the materials for the "statement of record," promotion and selling efforts on the third tract of land began. PIC had employed an exclusive agent for this purpose, Sellamerica Inc. Failla filed the "statement of record" on July 18, 1972, and it became "effective" thirty days later on August 17, 1972. Meanwhile, Sellamerica Inc. representatives had contracted to sell six lots to buyers. The buyers and the dates of purchase were as follows: Jordan (June 4, 1972), DelGado (June 25, 1972), Arella (July 8, 1972), DiMeglio (July 3, 1972), Canero (July 18, 1972), and Perri (July 18, 1972).

Three of these six buyers were given a "property report" before contracting to purchase land in Hickory Run Forest. These "property reports" were based upon the information contained in the "statements of record" already on file with respect to other sections of the project.

Both PIC and Charles Goldberg were charged and convicted for selling the six lots before the "effective" date of the registration on the third section of Hickory Run Forest. The corporation alone was charged and convicted for failing to provide "property reports" to three buyers.

B. The Fraud Charges

The fraud charges, under the Interstate Land Sales Full Disclosure Act and under the mail fraud statute, stem from

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representations about the disposal of household sewage made to buyers of land in Hickory Run Forest. The representations, according to the Government, were made in three ways: the "statement of record," the "property report," and oral statements by employees of Sellamerica, Inc (Gov't Br. 9-10). As previously indicated, "property reports" were given to only three buyers. The Government asserts that oral statements were made to three other buyers. *Ibid.* At trial, the Government conceded and the trial judge charged the jury that the defendants could not be convicted for land sale fraud on the basis of the "statements of record" because "there is no evidence that these buyers who came in here and testified in this case ever saw the Statement of Record and of course they wouldn't, it's on file in Washington and they are not required to see it, and therefore, not having seen it, they couldn't have relied on it" (A118). In sum, there could be six valid counts of fraud at most. The District Court nonetheless found both defendants guilty of seven counts, and the Court of Appeals affirmed.

The excess conviction is even more striking with respect to the individual defendant, Goldberg. In the case against him the trial judge concluded, and so charged the jury, that Goldberg was not responsible for the oral statements that might have been made by agents of Sellamerica, Inc. in his absence. "These agency principles I have mentioned do not apply to Mr. Goldberg, and he is to be judged on his own acts and conduct and not on anything that may have been done in his absence or not under his direction by Big Red or Marty or Ron, or any of the others" (A75). Thus, in the case against Goldberg, there could be at most three valid counts of fraud. Nonetheless, Goldberg was found guilty on seven fraud counts in the District Court, and the Court of Appeals affirmed.

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The quantitative overreaching for convictions thus demonstrated is matched by the qualitative overreaching in treating the representations as to sewage disposal as fraudulent. The nature of those representations is illustrated by the following excerpt from the "property report":

"SEWAGE DISPOSAL

Sewage disposal is provided by septic tanks to be constructed by the buyer at the estimated average cost of $600.00, under present price levels. Developer has been advised by its consulting engineer that such method of sewage disposal is acceptable for the subdividion under current state and local health regulations. Developer has also been advised that in some instances additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank. Such additional work may bring the total cost of sewage facilities to $1,200. Prior to installation of septic tanks or other on-lot sewage disposal systems, a permit must be obtained from local authorities. Buyer should determine the availability of such a permit for his lot from such authorities.

The developer has obtained a letter from the Penn Forest Township Supervisors that the use of septic tanks and other on-lot sewage disposal facilities will be approved for use in Hickory Run Forest subdivision upon issuance of a permit. Under ordinance of the township and pursuant to

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> rules, regulations and standards of the Penn. Department of Health, all as required under the Penn. sewage facilities act, a fee of $30.00 for each permit issued under the township ordinance will be required" (A156).

The alleged fraud in this representation does not lie in the assertion that buyers could install septic tank systems. So far as any evidence shows, every buyer could construct a septic tank on his lot. The alleged fraud did not concern the statement that the sewage disposal systems could be built on the site of land purchased. So far as the record shows, every buyer could have an on-site system. The alleged fraud did not stem from the statement that some lots would require additional corrective work in the form of a sand filter. The record showed that some lots required such filters to be installed below the surface of the ground, while in other instances an above ground sand filter was needed. The fraud, in the view of the trial court, was the failure to state clearly that where "additional corrective work" was required, and where that installation was above ground, the township officials were not legally authorized to issue permits until the Pennsylvania Department of Environmental Resources had approved.

The key sentence in the "property report" on this theory refers to a letter from the Penn Forest Township Supervisors. That letter, addressed to Pocono International, Inc., reads as follows:

> "This is to advise you that use of septic tanks and other on lot sewage disposal facilities will be approved for use in the Hickory Run Forest

> subdivision upon issuance of a permit under ordinance of this township and pursuant to rules, regulations and standards of the Pennsylvania Department of Health, all as required under the Pennsylvania Sewage Facilities Act.
>
> A fee of $30.00 for each permit issued under the township ordinance will be required" (A153).

The statement appearing in the "property report" thus was taken directly from the letter received by PIC from the Board of Supervisors of Penn Forest and referred to in the "property report."

The representation in the "statement of record," which no buyer saw, is similar to the "property report":

> "This method of sewage disposal has been approved by the Penn Forest Township Supervisors under ordinance of the township and pursuant to rules and regulations and standards of the Pennsylvania Department of Health" (A154).

The alleged oral statements made to three purchasers by the employees of Sellamerica were summarized by the Government in the court below: "salesmen of PIC's agent, Sellamerica . . . falsely told them there would be no trouble at all with putting in septic tanks on their lots (T962, 843, 812, 830-31)." (Gov't Br. 9).

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Notwithstanding the letter from the township supervisors to PIC, which formed the basis for the representations of PIC to potential buyers, there was substantial controversy at the trial and on appeal in the court below as to the nature of Pennsylvania law on the authority of local governments to permit septic tank installations. The Government contended, and the indictment rested on a theory that the township officials could not approve septic tanks if additional corrective work of any kind was required. The District Judge ruled, however, that the regulations of the Department of Environmental Resources did not disturb the power of a township to allow subsurface sand filters; as a direct result of this ruling, 16 of the fraud counts of the indictment were dismissed (T1097-1098, 1108). Controversy continued as to the above ground forms of corrective work.

For its position, the Government relies upon a regulation of the Pennsylvania Department of Environmental Resources that totally forbids a subsurface disposal system "when the percolation rate is over 60 minutes per inch." The next sentence provides that alternate methods shall not be used without Department approval. DER Regulations §73.61, Appendix F, *infra* (56a). For the Government to prevail, the quoted clause about slow percolation rates in the first sentence must be ignored in reading the second sentence of the regulation. The disposal problems that affected some of the lots in Hickory Run Forest was not related to slow percolation rates.

The Court of Appeals viewed this facet of the Government's case as raising a serious question. The appellate court eventually resolved that serious question in favor of the Government's

reading. The rationale of the court is consistent with appellate review of an administrative agency's actions, but totally misplaced in a criminal case. The Court of Appeals gives great deference to supposed expertise of the Department of Environmental Resources and the need to avoid conflicting policies on the part of municipalities throughout the state (Appendix A, *infra*, 10a-13a).

The most telling flaw in the prosecution's fraud case is the utter absence of any evidence of victims or injury. The Court of Appeals speculated that the failure of PIC to advert to the possible requirement of state approvals was material because "the purchaser might face delay, difficulty and substantial additional expense." (Appendix A, *infra*, 6a). There is nothing in the record to support that speculation. Although the Government produced evidence that 125 lots other than those charged in the indictment had been sold by PIC before effective registration with HUD (T1081), not a single buyer was shown to have complained or sought relief. To cover this embarrassing gap, the trial judge charged the jury that, with respect to the mail fraud charge, it was unnecessary for the Government to prove that any victim had suffered any loss (A69).

REASONS FOR GRANTING THE WRIT

The questions presented by this case focus upon basic constitutional rights in the context of a recent major federal statute that has not heretofore been construed by this Court. There are evident special and important reasons for this Court to exercise the judicial discretion to issue the writ of certiorari, as provided by Rule 19. Without elaborate argument on the

merits of the issues arising from this unprecedented case, it is appropriate to develop briefly how the questions presented vitally affect a substantial part of the United States economy and why petitioners urge this Court to grant the petition for certiorari.

First, The Interstate Land Sales Full Disclosure Act is one of the most significant statutes enacted by Congress in the past decade. The judicial gloss that will be given to the enforcement of this major regulatory innovation is obviously an important question of federal law that has not been, but should be settled by this Court. The statute consciously parallels the Securities Act, which opened the path for federal regulation of marketing of securities more than forty years ago. Federal regulation of the marketing of land, however, presents different congeries of issues.

Three dimensions of the Interstate Land Sales Full Disclosure Act are brought to sharp focus in the present case. The registration requirement is a factor that affects thousands of developers across the United States. Administrators in the Department of Housing and Urban Development have moved circumspectly on this requirement. For a number of years, it appears that the responsible officials concentrated on a program of informing the industry of the new federal constraints. Later, a policy of more strict enforcement was undertaken, but the indications are that a very substantial percentage of the developers and developments subject to the new statute are still unregistered. Compare *Hall v. Bryce's Mountain Resort, Inc.*, 379 F. Supp. 165 (W.D. Va. 1974).

In addition to the registration provisions, this case raises important new questions concerning the Act's requirements of disclosure to prospective land buyers. The Government has chosen to litigate these questions in the guise of a criminal fraud prosecution rather than in the civil forms permitted under the Act. However, applied, the quality and substance of the new Act's provisions for setting standards of the communication of information by developers to their prospects is plainly presented in this case. Notwithstanding the absence of *any* actual buyer who has sought relief, the Government elected to enforce its conceptions of the disclosure requirements.

The third dimension of the new statute highlighted by this case is the role of the criminal sanction in the Act's enforcement. The text of the statute plainly contemplates that civil remedies are the predominant form of giving force to the statute's mandates. Private citizens are given broad powers of contract avoidance; these are backed up by a new federal cause of action for relief from oppressive or overreaching developers. See *Hall v. Bryce's Mountain Resort, Inc., supra.* The Department of Housing and Urban Development is authorized to seek equitable remedies to prevent or redress actions proscribed by the Act. The criminal sanction is included in the Act as a supplement to the array of civil remedies. Yet it is the criminal sanction that first comes before this Court, with no obvious explanation for the Government's resort to this extreme remedy in this case.

Nearly four years have passed since the Department of Housing and Urban Development announced a policy of strict enforcement of the Interstate Land Sales Full Disclosure Act. The judicial fruits of that sharp shift in executive policy will

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soon be impacting the federal courts. This case will have a profound effect upon the approach that the lower courts will take to future or pending prosecutions. Therefore, this Court should grant review in the exercise of its sound discretion.

Second, the decision of the court below conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in *United States v. Steinhilber*, 484 F.2d 386 (8th Cir. 1973). The *Steinhilber* case, like this case, was a criminal prosecution under the Interstate Land Sales Full Disclosure Act, the charge was limited to alleged fraudulent misrepresentation. The Court of Appeals in *Steinhilber* reversed the conviction on the basis of the appellate court's conclusion that the evidence did not show that Steinhilber had knowingly and wilfully made false statements. Even though a properly charged jury had returned a verdict of guilty in that case, the Court of Appeals evaluated the developer's representations in the context that they had been made and arrived at a conclusion different from the verdict. The majority opinion concludes with the observation that a criminal fraud case is not the same as a civil proceeding:

> "If this were a contract action, we might be constrained to strictly construe Steinhilber's words against him. This, however, is a criminal action. Put simply, we do not believe that the Government proved beyond a reasonable doubt that Steinhilber knowingly and willfully made false statements in his answers to the questions." (484 F.2d at 391.)

The interpretation of the statute by the court below is directly in conflict with the reading of the Eighth Circuit. The

Second Circuit not only construed petitioners' words strictly against them; the court below went further and construed a regulation of the Pennsylvania Department of Environmental Resources strictly against petitioners. A regulation that explicitly dealt only with sewage disposal on land with slow percolation rates was interpreted to reach sewage disposal on land where this condition was not found. This tortured interpretation of the regulation against the facial meaning was conceded to be a serious problem by the court below. The court rationalized its conclusion against petitioners by arguments that would be relevant only in a civil proceeding.

Moroever even as to the words used by the defendants the judicial approaches in the two cases are in conflict. The defendant in *Steinhilber* declared that a water tank and a purification plant were "being built" and "being constructed." In fact, only preparatory efforts had been undertaken when these statements were made. The defendants in this case stated that they had received a letter from township officials on the procedure for obtaining permits to install septic tank systems and a letter from their consulting engineers. They had in fact received such letters, which were accurately restated in petitioners' submissions.

The conflict between the two cases is plain. The Eighth Circuit, explicitly conscious of the extraordinary nature of the criminal sanction under the new statute, applied a broad scope of review of the evidence and exercised judgment on whether that evidence showed wilfulness in the developer's conduct. The Second Circuit, by contrast, adopted standards appropriate in non-criminal proceedings and applied the narrowest scope of

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review of the evidence to uphold the supposed conclusion of the factfinder in the trial court.

Third, the record plainly shows that the petitioners in this case did not wilfully violate the Interstate Land Sales Act either as to the registration of the land in question or as to the charges of fraudulent misrepresentation. The discussion above regarding the fraud counts has demonstrated the absence of any basis for finding the criminal intent necessary for conviction. The conclusion is equally as strong with respect to the charge of late registration of the land in question. The record is replete with evidence that the petitioners, at all relevant times, had the intention to comply with the requirements of the Interstate Land Sales Full Disclosure Act. On two earlier sections of the same development, petitioners made timely filing through an attorney. A different agent was late in completing the third filing, but it occurred only 78 days after the first sale charged in the indictment. The registration was filed long before the Government obtained an indictment. The "statement of record" was the product of petitioners' attempt to comply with a novel and still cumbersome procedure. A 1975 article quotes the administrator in HUD, charged with enforcement of the Interstate Land Sales Act, as saying that half of the developers in the country subject to the Act had failed to file at any time. Schmidt, *Federal Regulation of Interstate Land Sales: The Limitations of Full Disclosure,* 11 Columbia J. of Law and Soc. Prob. 133, 149 n. 102 (1975). In this context, the prosecution and conviction of petitioners for "wilful" violation of the Act for late filing of the third "statement of record" is an act of punishment that is wholly improper.

Fourth, this case raises serious questions that are fundamental to the administration of criminal justice, namely fair notice of the charges against a criminal defendant and the right to trial on the indictment returned by the grand jury. *Ex parte Bain,* 121 U.S. 1 (1887); *Stirone v. United States,* 361 U.S. 212 (1960); *Bouie v. City of Columbia,* 378 U.S. 347 (1964); *United States v. Powell,* No. 74-884, 44 U.S.L. Week 4010 (Dec. 2, 1975). Further, it is plain from the evidence that the trial court permitted multiple verdicts of guilty to be returned on fraud counts where there was *no* evidence to support them. All of these errors were caused by the great confusion created by the prosecution as to the nature of the charges and the evidence thought to relate to them.

At the outset, the apparent prosecution theory of the fraud in this case rested on a simple notion that petitioners had impliedly represented to prospective buyers that they could install ordinary or conventional septic tank systems on their lots, whereas a substantial number of the lots would not take septic tanks without additional corrective work. This was the theory that permeated the indictment and the evidence. It was a theory derived from the prosecution's notion that local township officials could approve only the conventional septic tank installations; in the prosecutor's logic, since petitioners had told their customers that the township would approve septic tank systems, they had in effect told them that a simple installation was possible.

The prosecution theory fell apart when the District Court ruled that township officials could approve complex septic tank systems if the additional corrective work were beneath the

surface of the ground. That led to the dismissal of most of the fraud counts. The prosecution tried to rescue part of its case by amending its theory. Relying on a Department of Environmental Resources regulation about above-ground installations (literally applicable only to slow percolating land not involved in this case), the prosecution suddenly decided that the misrepresentation concerned the distinction between above-ground and subsurface corrective work.

In the midst of the confusion engendered by the prosecution's change of position, the trial court failed to note that, as to one or both defendants, there was no evidence at all to support conviction for misrepresentation of any kind on many of the counts that still remained.

Petitioners recognize that this Court does not sit as a court of errors and appeals. The abuses of defendants' rights to fair notice of the charges against them and a fair trial on those charges are proscribed by the Fifth Amendment. Far more than the correction of trial error is presented by the violation of these fundamental principles. Particularly when coupled with the other significant questions presented, these issues warrant exercise of this Court's certiorari power of review.

CONCLUSION

Petitioners have been subjected to criminal prosecution and heavy penalties of imprisonment and fine for charges under a novel and important federal statute. For the reasons set forth in this petition, it is respectfully submitted that this Court should grant the writ of certiorari.

Respectfully submitted,

s/ Jacob Kossman
Attorney for Petitioners

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APPENDIX A — OPINION AND JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 349 September Term 1975

Argued: October 17, 1975 Decided: November 26, 1975

Docket No. 75-1229

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES GOLDBERG and POCONO INTERNATIONAL CORPORATION,

Defendants-Appellants.

Before MANSFIELD, TIMERS and GURFEIN, *Circuit Judges.*

Appeal from judgments of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* convicting defendants after a jury trial of mail fraud, 18 U.S.C. §1341 and of violation of the registration and antifraud

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provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701, *et seq.*

Affirmed.

GIDEON CASHMAN, Esq., New York, N.Y. (Joel M. Eichengrun, Esq., Pryor, Cashman & Sherman, New York, N.Y., of counsel), *for Appellants.*

BART M. SCHWARTZ, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Anne Sidamon-Eristoff, Eugene Neal Kaplan, John D. Gordan, III, John C. Sabetta, Assistant United States Attorneys, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Pocono International Corporation ("PIC") and Charles Goldberg, its principal officer and stockholder, appeal from judgments entered by the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* finding them guilty of mail fraud, 18 U.S.C. §1341 (7 counts) and of violation of the relatively new Interstate Land Sales Full

Disclosure Act ("Act"), 15 U.S.C. §§1701, *et seq.* (13 counts). The latter statute, as its title indicates, was enacted in 1968 in order to prevent abuses and deceptive practices, including high-pressure and fraudulent sales techniques, in interstate sales of land.[1] The Act prohibits a land developer from using interstate facilities to sell or lease a lot in any land subdivision unless (1) the lot has first been registered with the Department of Housing and Urban Development ("HUD"), which can be accomplished by the developer's filing with it a "Statement of Record" containing prescribed details and waiting until the Statement has become "effective,"[2] and (2) a printed "Property Report," which is in the nature of a prospectus containing a condensed version of the Statement of Record and supporting exhibits, has been furnished to the prospective purchaser. In addition to being found guilty of mail fraud in the sale of lots, appellants were convicted of selling 6 lots which had not been registered as required by 15 U.S.C. §1703(a)(1),[3] and of selling 7 lots in violation of the general fraud provisions of 15 U.S.C. §1703(a)(2)(B).[4] Finding no reversible error, we affirm the convictions on all counts.

The record, viewed in the light most favorable to the government, as it must be on this appeal, *United States v. Castellana,* 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied,* 383 U.S. 928 (1966), reveals that PIC was incorporated by Goldberg and others in or about early 1970 for the purpose of acquiring, developing and subdividing some 820 acres known as Hickory Run Forest ("HRF") in the Pocono Mountains in Penn Forest Township, Carbon County, Pennsylvania (the "Township"). At all relevant times Goldberg owned at least 50% of PIC's issued

stock and was one of PIC's principal officers; at one time he was the company's president. The area to be exploited was divided into eight sections which were mapped, cleared and developed in piecemeal fashion, section by section, with certain sections first being registered with HUD by PIC's attorney in 1971 and early 1972. The sale of lots was handled exclusively by PIC's agent, Sellamerica, Inc., the principal officer of which, Rick Ebenstein, was also a PIC officer.

The lots which were the subject of the indictment were located in Sections 1-4 of HRF, for which a Statement of Record was filed with HUD on July 18, 1972, by Norman Failla, a broker employed by Goldberg on behalf of PIC for that purpose. Under the Act and HUD regulations, since HUD did not inform the registrant of any deficiencies within 30 days, the Statement became effective on August 17, 1972.[5] Prior to August 17, however, PIC made sales of unregistered lots to the customers named in six of the counts in the indictment; four of these sales were made even before the July 18 filing. The sales were as follows:

> Jordan, June 4 (Count 16); Delgado, June 25 (Count 18); Arella, July 8 (Count 20); DiMeglio, July 3 (Count 26); Cancro, July 18 (Count 30); and Perri, July 18 (Count 32).

In each instance the prospective customer, after being solicited by PIC's selling agent (Sellamerica) by telephone or in person, drove on interstate roads to HRF, was shown the lots by a salesman, signed a PIC purchase agreement, made a down

payment, and executed a loan agreement. Thereafter interstate facilities, including mails and telephone, were used to complete the purchases and pay off the loans.

Aside from the fact that the lots named in the indictment were not effectively registered when sold, some of the purchasers of these lots (Jordan, DiMeglio and Arella) were not furnished with a Property Report before making their puchases. The sales of unregistered lots alleged in the indictment furthermore represented but a small portion of the total number of lots sold prior to August 17, 1972, the date when the registration became effective. Approximately 125 additional unregistered lots were sold by PIC, of which some 115 were sold prior to the filing of the Statement of Record.

As a PIC officer Goldberg handled correspondence relating to sales of many of the unregistered lots, including those named in the indictment, and engaged in activities from which it could fairly be inferred that he knew at the time of the sales that the Statement of Record for the lots sold either had not yet been filed or was not yet effective. For instance, while sales of the lots were already being negotiated, he was still arranging for the procurement of maps and other records needed to file the Statement. Furthermore, after sales had begun he arranged for the issuance of a check to Failla for the filing fee and authorized Failla to obtain the signature of PIC's president on the Statement to be filed.

The fraud counts (both those charging violation of the mail fraud statute and those charging violation of the Interstate Land

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Sales Full Disclosure Act) were based on appellants' representations to seven named purchasers regarding the type of governmental approval required for installation of the on-site septic tank systems needed by the purchasers on the lots sold by PIC. Appellants advised purchasers that they would be able to dispose of household sewage by constructing on the lots septic tank systems that would be approved by the Township. This representation was made in a Statement of Record for earlier-registered sections, signed by Goldberg and incorporated in the later Statement filed for Sections 1-4, which encompassed the lots sold to purchasers named in the indictment.[6] It also appeared in the Property Report distributed to some purchasers.[7] Three purchasers were informed orally by PIC's sales agent (Sellamerica) that they would not have any trouble installing septic tanks in lots purchased by them. The materiality of these representations lay in the fact that if sewage systems approved by the local Township could be installed the matter would be routine, relatively trouble-free and inexpensive. If the lots, on the other hand, required installation of sewage systems for which permission must first be obtained from the Pennsylvania Department of Environmental Resources ("DER"), the purchaser might face delay, difficulty and substantial additional expense.

In actual practice the local Township would not, unless state approval had first been obtained, issue a permit for any septic tank sewage disposal system other than the standard or conventional type which comprised a septic tank and disposal area consisting of an underground tile field, seepage bed or serial distribution system. The government introduced evidence to the

effect that because of unfavorable soil conditions known to the defendants each of the lots that were the subject of the fraud counts on which they were convicted was unsuitable for such a conventional septic tank system or for any other type of system that would be approved by the local Township and that each lot would require a special corrective system in the form of an above-ground sand filter bed known as a "turkey mound." According to the policy and practice of the Pennsylvania DER, which was set forth in its manual and instructions to local sewage enforcement officers and adhered to in practice by the Township's sewage officer, the Township would not issue a permit for a "turkey mound" or other type of exotic sewage system, such as a below-ground sand filter bed or an aerobic tank. In practice state DER approval for such systems was required. This policy and practice of the DER and Township was known to the engineer, Joseph Michel, who had been employed by the defendants to study HRF and advise as to the sewage requirements that must be met by prospective purchasers of lots.

In May, 1971, prior to the representations made by PIC to purchasers that local Township approval of septic tank systems required to be installed on their lots would be forthcoming, Michel, who had studied and tested the HRF area and had reviewed reports of the federal Soil Conservation Service on HRF, advised Goldberg that approximately 20% of the lots had slow percolation rates, stoniness, shallowness, high water tables, or other severe limitations requiring special systems, such as aerobic tanks or evapo-transpiration beds, which could be installed only with state approval. Dr. Glade Loughry, Chief of

the Soil Science Unit of DER, testified that a large portion of HRF was unsuitable for septic tanks with standard drainage systems and that each of the lots referred to in the counts upon which defendants were convicted was unsuitable for conventional-type subsurface sewer disposal because the water table was within four feet or less of the surface of the soil.

At trial the government contended that state approval was required for any system other than a conventional subsurface disposal system, whether the special corrective system was above or below ground. More specifically the government argued that a subsurface sand filter system required state approval. The court, however, ruled that, notwithstanding the DER policy as set forth in its manual and the local Township practice, state approval was not clearly required by DER Regulations for subsurface sand filters but that it was required for above-ground sand filters, i.e., "turkey mounts." Accordingly, Judge Brieant dismissed those counts involving lots where subsurface sand filters might be installed, leaving those counts naming lots that would require a "turkey mount" type of system. These were the fraud counts upon which defendants were convicted.

DISCUSSION

Appellants argue that their fraud convictions must be reversed on the ground that the district court improperly permitted the indictment to be constructively amended by allowing the case to go to the jury on unalleged charges and facts. See *Russell v. United States*, 369 U.S. 749, 770-71 (1962); *Stirone v. United States*, 361 U.S. 212 (1960); *Ex parte Bain*, 121

U.S. 1 (1887). First it is claimed that although the indictment charged the defendants with falsely representing to purchasers of HRF lots that they could construct "on-site septic tank systems which would be approved by the Township of Penn Forest" the court permitted the case to be presented on the theory that they falsely represented the lots to be suitable for "conventional" septic tank systems for which permits would be issued by the Township. The use of the word "conventional," it is argued, amounted to a material and prejudicial variance. We disagree.

The record reveals that the term "conventional system," which significantly is used in the introductory part of the indictment, was defined at trial and understood by all parties to be merely a cryptic colloquial method of referring to the type of simple standard system which would require only Township, as distinguished from DER, approval. Moreover the defendants not only failed to object to use of the term, thus waiving any objection to its use, see *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966), but themselves used it in their examination of witnesses, including Michel, their own engineer, who used the term in describing on-lot sewage systems and defined it as the simple standard system for which Township officials could issue permits, as distinguished from systems requiring state DER approval. The fraud proved by the government, therefore, was the fraud alleged in the indictment. No new fraud or new theory of fraud was added as the basis for conviction.

Appellants next urge that the indictment was constructively amended by permitting the government, despite the fact that the

land fraud counts (like the mail fraud counts) referred specifically only to certain mailings as a means of interstate commerce used to carry out the fraud, to introduce proof of non-mail interstate activity, such as interstate transportation and telephone. This contention borders on the frivolous. The indictment's allegation of specific mailings as a basis of jurisdiction did not preclude the government from offering evidence of use of other interstate facilities. The offense was the land fraud, not the jurisdictional element. *United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). Moreover, the indictment contained a general allegation of the use of interstate facilities, along with its allegation of the specific mailings. Cf. *United States v. Conti*, 361 F.2d 153, 157-58 (2d Cir. 1966), *vacated and remanded on other grounds*, 390 U.S. 204 (1968). Indeed, appellants' counsel, in arguing unsuccessfully in the district court that joinder of the mail fraud and land fraud counts was multiplicitous, conceded that "the Government is free to prove the Title 15 fraud counts by establishing the use of any interstate facility or the mails." In any event, as the convictions on the mail fraud counts demonstrate, the interstate mailings were established and no prejudice is shown to the defendants as the result of the government's proof of other jurisdictional bases. The crimes for which they stand convicted are clearly those alleged in the indictment.

Appellants' attack upon the district court's interpretation of certain DER regulations as the basis for conviction raises a more serious question. Specifically, appellants contend that there was no misrepresentation because the Township, notwithstanding the

practice and policy of DER, possessed the unrestricted power under the Pennsylvania Sewage Facilities Act, 35 P.S. §750.1, and DER Regulations promulgated thereunder to issue permits for "septic tank systems" without restriction, see §7, Penn. Sewage Facilities Act. This power, the argument goes, could not be voluntarily surrendered by the Township and could be withdrawn or taken over by the DER only by following a procedure prescribed by its own Regulations (Ch. 71, §71.31), which had not occurred in the case of the Township. Appellants further urge that the district court erred in interpreting two sections of the DER's Regulations as requiring state DER approval for the construction of a "turkey mound." The two sections read as follows:

"Subchapter B. INDIVIDUAL SEWAGE DISPOSAL FACILITIES
GENERAL

"§ 73.11 *Overall requirements.*

* * * * *

"(e) The maximum elevation of the groundwater table shall be at least four feet below the bottom of the excavation for the leaching area. Rock formations and impervious strata shall be at a depth greater than four feet below the bottom of the excavation."

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"ABSORPTION AREA REQUIREMENTS

"§ 73.61. *General.*

> "(a) When the percolation rate is over 60 minutes per inch, a subsurface disposal system as described in this Chapter shall not be used. Proposed alternate methods shall not be used unless approved by the Department."

The trial judge reasoned that the term "alternate" as used in the second sentence of §73.61(a) refers to those systems which may be installed as alternatives to "subsurface" systems. Under this construction a "turkey mound," being above the surface, would require DER approval. This interpretation confirmed the view that had been taken by the DER, which required that its approval be obtained for "turkey mounds." Appellants, on the other hand, argue that §73.61(a), in using the term "alternate," was intended to refer only to methods that might be required because of an excessively slow soil percolation rate and not to those adopted in response to a high water problem.

Appellants' restrictive interpretation of the two sections of the DER regulations has some facial appeal. However, the DER's construction not only gives effect to the literal language of the regulations but is in accord with the overall purpose and scheme of the Pennsylvania Sewage Facilities Act, which is to delegate to the DER in the first place the power to promulgate regulations for the "adoption of standards for construction and installation of individual and community sewage disposal

systems" (§3). These standards are then to be applied and administered by the municipalities. Where no standards had yet been adopted by the DER for a particular type of system (such as a turkey mound or other exotic method of sewage disposal) it was reasonable and in accordance with the policy and purpose of the Act to interpret it as requiring approval of such a system by the DER as the agency vested with authority to establish state-wide controlling standards.[8]

The DER's interpretation, furthermore, being that of the agency which not only promulgated the regulations but is responsible for their state-wide administration, is entitled to considerable respect. See, e.g., *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Gulf Oil Corp. v. Hickel*, 435 F.2d 440, 444-45 (D.C. Cir. 1970). Any other interpretation of the regulations could lead to conflicting policies on the part of municipalities throughout the state, varying according to each local township's views.

In any event, defendants' convictions here do not turn solely upon the district court's interpretation of the foregoing regulations. Whether or not the regulations were vague or the DER's construction of them strained, appellants knew that DER had insisted in practice that its approval would be required for turkey mounds or similar exotic systems (such as aerobic tanks or evapo-transpiration beds), and that the Township, although it would issue permits for standard conventional systems, would not issue a permit for such unconventional systems[9] unless DER approval had first been obtained. Nevertheless the defendants not only failed to advise the purchasers of the lots for which

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defendants were convicted that DER approval for turkey mounds or aerobic tanks would be required but falsely stated that *"This method of sewage disposal* [i.e., septic tanks costing approximately $600 each] *has been approved by the Penn Forest Township Supervisors"* and that the developer has obtained a letter from the Supervisors that "the use of septic tanks and other on-lot sewage disposal facilities *will be approved* for use in Hickory Run Forest subdivision upon issuance of a permit." (Emphasis supplied). In fact the method of sewage disposal utilizing septic tanks of the type that could be installed at a cost of $600 each had not been approved by the Township for the lots in question. Nor did the Township's letter to PIC (dated May 3, 1971) state that it would approve "the use of septic tanks and other on-lot sewage disposal facilities" of the type that might involve construction of a sand filter bed, much less that it would approve "turkey mounds." The Township's letter simply stated that it would approve septic tanks and other on-lot sewage disposal facilities for use in HRF "upon issuance of a permit under ordinance of this township and pursuant to rules, regulations and standards of the Pennsylvania Department of Health, all as required under the Pennsylvania Sewage Facilities Act." (A. 153) The letter amounted to nothing more than a statement that the Township would give whatever approval it was permitted to give under state and local law. Viewed as a whole this evidence, together with the other proof, was sufficient to permit the jury to find the defendants guilty of the fraud charges.

We have carefully considered appellants' other claims of error and find them to be without merit. Judge Brieant's charge

to the jury was reasonably clear and accurate rather than confusing or ambiguous as appellants now claim. Indeed, none of the alleged errors were called to his attention at trial. In the absence of plain error, which does not exist, this failure to object precludes reversal. Rule 30, F.R.Cr.P.; *United States v. Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974). Goldberg's conviction for the sale of unregistered land is also amply supported by record evidence. Appellants' attack on Failla's testimony as being replete with "palpable weakness and glaring inconsistencies" was apparently rejected by the jury, which is the final arbiter of credibility. Moreover, there was sufficient evidence, aside from Failla's testimony, to sustain the verdict. The joinder of the fraud and non-registration counts, being based upon identical acts and transactions which formed part of a single scheme and were established in large measure by the same evidence, was not improper. *United States v. Adams*, 434 F.2d 756 (2d Cir. 1970). Appellants' claim of improper joinder was in any event waived by failure prior to or during trial to move for a severance or a direction that the government be required to elect the counts to be tried. See *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Perl*, 210 F.2d 457, 461-62 (2d Cir. 1954). No legally recognizable reason is advanced in support of appellants' demand for reconsideration of Goldberg's sentence which, being within the statutory limits and not subject to attack as unlawful, is not reviewable. *Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974).

The convictions are affirmed.

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FOOTNOTES

1. 113 Cong. Rec. 315 (Jan. 12, 1967).

2. A Statement of Record filed with HUD becomes effective when any deficiencies noted by HUD have been corrected by the registrant or, where no such deficiencies are noted, upon the expiration of 30 days after filing.

3. "§ 1703. PROHIBITIONS RELATING TO SALE OR LEASE OF LOTS IN SUBDIVISIONS; VOIDABILITY OF CONTRACTS OR AGREEMENTS

> "(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means of instruments of transportation or communication in interstate commerce, or of the mails —
>
> > "(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and * * *."

4. "(a) It shall be unlawful for any developer or agent, ...

* * * * *

"(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision —

* * * * *

(b) to obtain money or property by means of a material misrepresentations with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or . . . ."

Six of the seven lots which were the subject of the fraud counts were also the basis of the non-registration counts.

5. Due to oversight HUD allowed the 30-day period to expire before it on August 17, 1972, mailed a letter to PIC noting deficiencies. Thereafter the defendants and HUD proceeded to negotiate correction of the deficiencies, apparently unaware that the Statement had become effective.

6. The Statement of Record, after advising that septic tanks were to be used for all lots at an average cost of $600 each, stated:

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"8. This method of sewage disposal has been approved by the Penn Forest Township Supervisors under ordinance of the township and pursuant to rules and regulations and standards of Pennsylvania Department of Health.

"9. The State Health Department requires percolation tests to determine suitability for the use of septic tanks. The developer's engineers have made such tests and the report of these tests is attached hereto in the Exhibit shown."

7. The Property Report advised that the buyer could provide for sewage disposal by constructing a septic tank at an average cost of $600, which method, according to the developer's consulting engineer, "is acceptable for the subdivision under current state and local health regulations," that in some instances "additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank," bringing the total cost of sewage facilities to $1,200, that a permit must first be obtained from local authorities, that the buyer should first determine the availability of the permit from local authorities and that "[t]he developer has obtained a letter from the Penn Forest Township Supervisors that the use of septic tans and other on-lot sewage disposal facilities will be approved for use in Hickory Run Forest subdivision upon issuance of a permit."

8. For instance, the regulations expressly required state approval for aerated systems. See, e.g., §73.41 which provided:

"AEROBIC SEWAGE TREATMENT SYSTEMS

§ 73.41. *General*

"(a) Aerobic sewage treatment systems shall be installed only on an experimental basis. No approving body shall issue a permit for the installation of an aerobic sewage treatment system without prior written approval by the Department."

9. Michel, PIC's engineer, advised Goldberg "about aerated tanks, sand filters and bringing fill in and that the conditions would require a [sewage disposal] design which would have to be approved by the Department of Health [predecessor of the DER]," (Tr. 421). Michel also wrote a letter to PIC, dated May 4, 1971, advising that, while on-site systems were feasible, standards for aerated tanks and subsurface sand filter beds were necessary and would have to be met in some cases.

APPENDIX B — ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of December, one thousand nine hundred and seventy-five.

Present: HON. WALTER R. MANSFIELD,

HON. WILLIAM H. TIMBERS,

HON. MURRAY I. GURFEIN,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Pocono International Corporation and Charles Goldberg,

Defendants-Appellants.

75-1229

Appendix B — Order Denying Rehearing

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX C — OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

POCONO INTERNATIONAL CORP. and CHARLES GOLDBERG,

Defendants.

73 Crim. 630-CLB

Brieant, J.

In June 1974, defendants were tried before this Court and a jury, and on June 14, 1974, the jury rendered a verdict of guilty as to both defendants, convicting them on various counts of selling land without an effective Statement of Record [15 U.S.C. §1703(a)(1)]; mail fraud [18 U.S.C. §1341] and land sales fraud [15 U.S.C. §1703(a)(2)B]. The corporate defendant was also convicted of selling land without timely deliv ry of a Property Report [15 U.S.C. §1703(a)(1)].

By notice of motion filed January 17, 1975, defendants moved pursuant to Rule 29, F. R. Crim. P. for an order entering

a judgment of acquittal or, in the alternative, pursuant to Rule 33, F. R. Crim. P. for a new trial of the land and mail fraud counts,[1] based on newly discovered evidence. The motion was argued on February 7, 1975.

By Memorandum and Order dated December 30, 1974, this Court denied defendants' earlier motion pursuant to Rules 29 and 33, F. R. Crim. P., relating to the same fraud counts, addressed primarily to the issue of whether the Court correctly interpreted and charged the jury on a question of Pennsylvania law regarding the approval and issuance of permits for on-lot sewage systems.

On June 3, 1974, during trial, the Court, by Memorandum and Order, also denied defendants' motion, made on the ground of multiplicity, to require the Government to elect to prosecute either under the general mail fraud statute or under the land sale fraud statute.

The present motion is based on a claim that evidence of the issuance of permits for on-lot sewage systems granted in 1973-74, prior to or during trial, knowledge of which might have affected the outcome of the trial, was suppressed by the Government, or, alternatively, withheld by Pennsylvania state officials so closely associated with the prosecution that their claimed misconduct is treated as that of the United States Attorney's Office. Defendants also allege that evidence of

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1. Counts 2, 4, 7, 8, 9, 11, 12, 19, 21, 27, 29, 31, 33 and 41.

permits issued since the trial, taken with the suppressed evidence, is sufficient to warrant either a judgment of acquittal of the fraud counts, or a new trial.

Pocono International Corporation ("Pocono") and defendant Goldberg, chief operating officer of Pocono, sold unimproved lots of residential land in a Pennsylvania subdivision known as Hickory Run Forest. The fraud of which they stand convicted is that at the time they sold the lots enumerated in the indictment, they misrepresented to the purchasers that "conventional" septic tank systems could be installed on each homesite for a certain price, and that such systems would be approved by a local township sanitarian, knowing that most of the sites were unsuitable for conventional systems and that much more expensive non-conventional systems would have to be installed and approved by state rather than local authorities.

False representations were made orally by selling agents of the corporations. Defendant Goldberg was not found to have knowledge of these oral misrepresentations. Written misrepresentations, attributable to both defendants, are contained in Statements of Record, filed with the Department of Housing and Urban Development, and also in Property Reports incorporated in the Statement of Record, copies of which Reports must be distributed to prospective purchasers pursuant to 15 U.S.C. §1701, *et seq.*

The Property Report (Government Exhibit 9A) stated that sewage disposal was to be provided by septic tanks which could

be installed at an estimated cost of $600.00, but "in some instances" sand filter beds would be necessary to permit installation of on-lot septic tank systems, which "may" bring the cost to $1,200.00, and that the Penn Forest Township Supervisors would approve such systems. This information was contained in the first Statement of Record, filed on May 20, 1971, covering Sections 7 and 8 of Hickory Run Forest and remained substantially the same in the Statement of Record for Sections 5 and 6 filed March 12, 1972, as well as in the Statement of Record for Sections 1 through 4, the sections involved in this indictment, filed July 18, 1972 (Tr. p. 267). Defendant Goldberg signed the first Statement of Record.

A consulting engineer, Joseph Michel, employed by the company to prepare plat maps of the subdivision and to determine the kinds and cost of on-lot sewage disposal systems which could be used in the development, testified for the Government. Mr. Michel did not write and did not see the allegedly fraudulent statements until after this indictment was brought. In early 1971, Mr. Michel told Mr. Goldberg that on-lot systems were feasible, but there were problems such as seasonal high water level, stoniness and soil impermeability that would require specially designed systems such as aerated treatment tanks, subsurface sand filter beds or above ground sand filter beds, referred to as "turkey mounds," that had to be approved by the State Department of Environmental Resources (Tr. p. 416).

A report written by Mr. Michel to Pocono dated May 4, 1971 was attached to the Statement of Record, in which Mr.

Michel gave his opinion that on-site sewage disposal systems were feasible, but aerated tanks or subsurface sand filter beds must be used "where necessary." The letter does not state how many lots would require such systems. The letter is somewhat unclear on the question of what the cost of sewage disposal systems would be. At trial, Mr. Michel explained that his estimate of between $900.00 and $1,200.00 referred to a standard system, a system including an anaerobic septic tank and an ordinary leaching field, not an aerated tank, subsurface sand filter or turkey mound (Tr. p. 455).

Mr. Michel denied that he told Goldberg at least 20% of the acreage proposed to be sold for homesites in Hickory Run Forest would require special systems. However, in his grand jury testimony read at the trial, he admitted having done so (Tr. p. 425). Mr. Michel had done some on-site testing, but his opinion was based primarily on information contained on soil maps prepared by the United States Department of Agriculture Soil Conservation Department, the same source Dr. Frank G. Loughry, a soil scientist with the Pennsylvania Department of Environmental Resources ("DER") relied on to reach the same conclusion. Dr. Loughry testified that standard septic tank systems could not be used in large portions of Sections 1 through 4 of Hickory Run Forest and that a permit for alternate systems such as one including a turkey mound could not be issued by the town but required approval by the DER.

The jury apparently found that Mr. Goldberg and the company were aware, through the company's own consulting engineer, of the difficulties the soil in Sections 1 through 4

presented for sewage disposal and the need for state approval of non-standard systems in 1971 and 1972. The information contained in the Statement of Record may be somewhat ambiguous, but this was a question of fact which the jury reasonably resolved against the defendants.

Defendants argue that the township believed it could issue permits for the subdivision and that defendants reasonably relied on the township's representations. Neither side presented any witnesses from the township who dealt in the issuance of permits. The evidence presented at trial shows that under state regulations in effect in 1971 and 1972, as well as practice and usage testified to by Dr. Loughry and John Boffenmeyr of the DER, and Mr. Michel, the town could not have issued permits for turkey mounds or any other non-conventional systems without approval from the DER, and defendants knew this through Mr. Michel. Mr. Goldberg's grand jury testimony, read at the trial, makes it clear that he knew at least from October of 1971 that the DER considered subsurface sewage disposal systems inappropriate for much of the subdivision because of unsuitable soil conditions (Tr. p. 1062).

In explanation of their actions in going forward with the sale of lots in the development and representing that conventional septic tank systems could be built and would be approved by the township, despite knowledge that the DER took a position against conventional systems, defendants presented themselves throughout the trial as innocent bystanders, if not victims, of a dispute between the township and the DER. Testimony was elicited from Dr. Loughry and Mr.

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Boffenmeyr that the DER had been dissatisfied with the town's issuance of permits in 1971 and 1972 for conventional systems on soils deemed unsuitable for such systems by the DER. In 1973, the DER brought suit pursuant to the Pennsylvania Sewage Facilities Act and took from the town its authority to issue permits, for a time issuing permits itself.

Since 1971, the regulations have been amended. Among other changes, the new regulations specifically include turkey mounds, which were not mentioned in the old regulations, and set forth instructions for their use and construction.

In addition, township sanitarians were trained by the DER in methods of making more detailed soil studies than they previously had the expertise to make to identify soil types and conditions. When the authority of the township to issue permits was restored, the DER was apparently satisfied that future permits would be issued in conformity with its standards and regulations.

The importance of the permits of which defendants claim ignorance at the time of trial, either because they were deliberately withheld or because they were issued after trial, is that, according to defendants, they show defendants were correct in stating purchasers could and did get approval for conventional systems from the town as well as from the DER on soils the DER had said were unsuitable for such systems. Therefore, the argument goes, the statements defendants made to prospective purchasers were not fraudulent.

Appendix C — Opinion of District Court

As of January 14, 1975, approximately 90 permits were issued for Hickory Run Forest, nearly half by the DER, the remainder by the township (Affidavit of Elliot A. Taikeff, Esq., sworn to Jan. 17, 1975). Defendants originally alleged that 23 township permits issued before trial were not produced by the DER in response to defendants' subpoena, but now concede that they knew some of these permits existed. Their present claim is that 16 permits were wrongfully withheld by the DER.

Defendants do not deny that on and after March 6, 1974, DER files in the United States Attorney's Office, including town and DER issued permits and applications, were made available for inspection and were inspected by them. Three subpoenas dated May 28, 1974 were served by defendants on DER officials. It is undisputed that these officials were willing to comply with the subpoenas (see letters attached to Affidavit of Anne S. Eristoff, Esq., sworn to Jan. 27, 1975), but nothing was done beyond asking the DER officials to remain on call.

The bare assertion of failure to comply with the subpoenas or deliberate suppression is unsupported by any factual showing. Rather, the evidence is clear that the Government and the DER made every effort to supply defendants' attorney with whatever information was available to them on the subject of permits. It is obvious from the trial record that defendants knew the township had issued permits for conventional systems after July 1973, when its authority to do so was restored. Dr. Loughry was cross-examined concerning nine such permits (Tr. pp. 772, 780-81, 783), some of which were introduced as defense exhibits. Mr. Boffenmeyr testified that a week earlier, he had been advised by

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the township enforcement officer that about 20 township permits for conventional systems had been issued after July 1973 and he was cross-examined concerning eight such permits.

The Court finds there was no failure to disclose by the Government. This case is clearly distinguishable from *United States v. Giglio*, 405 U.S. 150 (1972), in which a new trial was granted for that reason. There is likewise nothing to support an inference of prosecutorial misconduct (see, e.g., *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968) or prosecutorial negligence (see, e.g., *United States v. Fried*, 486 F.2d 201 (2d Cir. 1973).

With respect to permits issued prior to and during trial, defendants have plainly failed to meet the first requirement of the traditional test applied to motions for a new trial [*United States v. Kahn*, 472 F.2d 272, 287 (2d Cir. 1973), *cert. denied*, 411 U.S. 982]:

> "The evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict."

With respect to all of the permits, including those issued after trial, their introduction at trial would have been "merely cumulative and impeaching" and undoubtedly would not "produce a different verdict."

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Appendix C — Opinion of District Court

As was pointed out earlier, the dispute between the DER and the township was brought out and fully explored by defendants at trial through the DER witnesses, Dr. Loughry and Mr. Boffenmeyr. The position of the DER that much of the soil in Hickory Run Forest was unsuitable and permits should not be issued, the issuance of permits for soils said by the DER to be unsuitable, the defendants' alleged reliance on township authority, were all before the jury, and on summation, based on this evidence, the jury was asked to find that the defendants had not engaged in a fraudulent scheme, but acted in reasonable reliance on representations of the township officials. The jury rejected this argument. Had the defense offered still more permits to bolster its position, we cannot say the verdict would have been different. Nor can we say that the evidence of fraud was not sufficient so that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt," *United States v. Taylor,* 464 F.2d 240, 243 (2d Cir. 1972).

Defendants' motions are in all respects denied.

So Ordered.

Dated: New York, New York
April 25, 1975

s/ Charles L. Brieant, Jr.
CHARLES L. BRIEANT, JR.
U. S. D. J.

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APPENDIX D — 15 U.S.C. §§1701-1720

Section 1701. Definitions. — For the purposes of this title [§§1701 and notes-1720 of this title], the term —

(1) "Secretary" means the Secretary of Housing and Urban Development;

(2) "person" means an individual, or an unincorporated organization, partnership, association, corporation, trust, or estate;

(3) "subdivision" means any land which is divided or proposed to be divided into fifty or more lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan and where subdivided land is offered for sale or lease by a single developer, or a group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan;

(4) "developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;

(5) "agent" means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision; but shall not include an

attorney at law whose representation of another person consists solely of rendering legal services;

(6) "blanket encumbrance" means a trust deed, mortgage, judgment, or any other lien or encumbrance, including an option or contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result of the imposition of any tax assessment by any public authority;

(7) "interstate commerce" means trade or commerce among the several States;

(8) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(9) "purchaser" means an actual or prospective purchaser or lessee of any lot in a subdivision;

(10) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1402, 82 Stat. 590.)

Short title. — Section 1401 of Act Aug. 1, 1968, cited to text, provided: "This title [§§ 1701 and notes-1720 of this title] may be cited as the 'Interstate Land Sales Full Disclosure Act'."

Effective date. — Section 1422 of Act Aug. 1, 1968, cited to text, provided: "This title [§§ 1701 and note-1720 of this title]

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shall take effect upon the expiration of two hundred and seventy days after the date of its enactment [Aug. 1, 1968]."

1702. Exemptions. — (a) Unless the method of disposition is adopted for the purpose of evasion of this title [§§ 1701 and notes-1720 of this title], the provisions of this title [§§ 1701 and notes-1720 of this title] shall not apply to —

(1) the sale or lease of real estate not pursuant to a common promotional plan to offer or sell fifty or more lots in a subdivision;

(2) the sale or lease of lots in a subdivision, all of which are five acres or more in size;

(3) the sale or lease of any improved land on which there is a residential commercial, or industrial building, or to the sale or lease of land under a contract obligating the seller to erect such a building thereon within a period of two years;

(4) the sale or lease of real estate under or pursuant to court order;

(5) the sale of evidences of indebtedness secured by a mortgage or deed of trust on real estate;

(6) the sale of securities issued by a real estate investment trust;

(7) the sale or lease of real estate by any government or government agency;

(8) the sale or lease of cemetary lots;

(9) the sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business; or

(10) the sale or lease of real estate which is free and clear of all liens, encumbrances, and adverse claims if each and every purchaser or his or her spouse has made a personal on-the-lot inspection of the real estate which he purchased and if the developer executes a written affirmation to that effect to be made a matter of record in accordance with rules and regulations of the Secretary. As used in this subparagraph, the terms "liens", "encumbrances", and "adverse claims" do not refer to property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, nor to taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable, nor to beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, if (A) the developer, prior to the time the contract of sale or lease is entered into, has furnished each purchaser or lessee with a statement, the form and content of which has been approved by the Secretary, setting forth in descriptive and concise terms all such reservations, taxes, assessments, and restrictions which

are applicable to the lot to be purchased or leased, and (B) receipt of such statement has been acknowledged in writing by the purchaser or lessee, and a copy of the acknowledged statement is filed with the Secretary in accordance with such rules and regulations as he may require.

(b) The Secretary may from time to time, pursuant to rules and regulations issued by him, exempt from any of the provisions of this title [§§ 1701 and notes-1720 of this title] any subdivision or any lots in a subdivision, if he finds that the enforcement of this title [§§ 1701 and notes-1720 of this title] with respect to such subdivision or lots is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the public offering. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1403, 82 Stat. 590; Dec. 24, 1969, P.L. 91-152, Title IV, § 411, 83 Stat. 398.)

Amendment note. — Act Dec. 24, 1969, cited to text, in par. (10) of subsec. (a), substituted "made a personal on-the-lot inspection of the real estate" for "personally inspected the lot", substituted "do not refer" for "are not intended", inserted "imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association,", and added all that part beginning", nor to beneficial property restrictions" and continuing to the end of the paragraph.

1703. Prohibitions relating to the sale or lease of lots in subdivisions. — (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or

instruments of transportation or communication in interstate commerce, or of the mails —

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 [§ 1706 of this title] and a printed property report, meeting the requirements of section 1408 [§ 1707 of this title], is furnished to the purchaser in advance of the signing of any contract of agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision —

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

(b) Any contract or agreement for the purchase or leasing of a lot in a subdivision covered by this title [§§ 1701 and notes-1720 of this title], where the property report has not been given to the purchaser in advance or at the time of his signing, shall be

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voidable at the option of the purchaser. A purchaser may revoke such contract or agreement within forty-eight hours, where he has received the property report less than forty-eight hours before he signed the contract or agreement, and the contract or agreement shall so provide, except that the contract or agreement may stipulate that the foregoing revocation authority shall not apply in the case of a purchaser who (1) has received the property report and inspected the lot to be purchased or leased in advance of signing the contract or agreement, and (2) acknowledges by his signature that he has made such inspection and has read and understood such report. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1404, 82 Stat. 591.)

1704. Registration of subdivisions. — (a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the requirements of this title [§§ 1701 and notes-1720 of this title] and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this title [§§ 1701 and notes-1720 of this title.] A statement of record shall be deemed effective only as to the lots specified therein.

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this title [§§ 1701 and notes-1720 of this title], and such expenses as are paid from such fees shall be considered nonadministrative.

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b).

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1405, 82 Stat. 592.)

1705. Information required in statement of record. — The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section —

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

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(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7)(A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, join stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1406, 82 Stat. 592; Dec. 31, 1970, P.L. 91-609, Title IX, § 909, 84 Stat. 1811.)

Amendment note. — Act Dec. 31, 1970, cited to text, inserted "the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer," in par. (5).

1706. Taking effect of statements of record and amendments thereto. — (a) Except as hereinafter provided, the effective date of a statement of record, or any amendment

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thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing, shall be held within twenty days of receipt of such request by the Secretary.

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d). In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be

proper ground for the issuance of an order suspending the statement of record.

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1407, 82 Stat. 593.)

1707. Information required in property report. — (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406 [§ 1705(7)-(11) of this title]. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1408, 82 Stat. 594.)

1708. Cooperation with State authorities. — (a) In administering this title [§§ 1701 and notes-1720 of this title], the

Secretary shall cooperate with State authorities charged with the responsibility of regulating the sale of lots in subdivisions which are also subject to this title [§§ 1701 and notes-1720 of this title] and may accept for filing under section 1405 [§ 1704 of this title] and declare effective as a statement of record, if he finds such action to be appropriate in the public interest or for the protection of purchasers, material filed with and found acceptable by such authorities.

(b) Nothing in this title [§ 1701 and notes-1720 of this title] shall affect the jurisdiction of the real estate commission (or any agency or office performing like functions) of any State over any subdivision or any person. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1409, 82 Stat. 594.)

1709. Civil liabilities. — (a) Where any part of the statement of record, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, any person acquiring a lot in the subdivision covered by such statement of record from the developer or his agent during such period the statement remained uncorrected (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue the developer.

(b) Any developer or agent, who sells or leases a lot in a subdivision —

(1) in violation of section 1404 [§ 1703 of this title], or

(2) by means of a property report which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, may be sued by the purchaser of such lot.

(c) The suit authorized under subsection (a) or (b) may be to recover such damages as shall represent the difference between the amount paid for the lot and the reasonable cost of any improvements thereto, and the lesser of (1) the value thereof as of the time such suit was brought, or (2) the price at which such lot shall have been disposed of in a bona fide market transaction before suit, or (3) the price at which such lot shall have been disposed of after suit in a bona fide market transaction but before judgment.

(d) Every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment.

(e) In no case shall the amount recoverable under this section exceed the sum of the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1410, 82 Stat. 595.)

1710. Court review of orders. — (a) Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of

business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record upon which the order or determination complained of was entered, as provided in section 2112 of title 28, United States Code. No objection to an order or determination of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon a hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. Upon the filing of such petition, the jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Secretary, shall be final, subject to review

by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Secretary's order. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1411, 82 Stat. 595.)

1711. Limitation of actions. — No action shall be maintained to enforce any liability created under section 1410(a) or (b)(2) [§ 1709(a), (b)(2) of this title] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 1401(b)(1) [§ 1709 (b)(1) of this title], unless brought within two years after the violation upon which it is based. In no event shall any such action be brought by a purchaser more than three years after the sale or lease to such purchaser. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1412, 82 Stat. 596.)

Reference in text. — "Section 1401(b)(1)," referred to in this section, was probably intended to read "section 1410(b)(1)," which appears as § 1709(b)(1) of this title.

1712. Contrary stipulations void. — Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this title [§§ 1701 and note-1720 of this title] or of the rules and regulations of the Secretary shall be void. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1413, 82 Stat. 596.)

1713. Additional remedies. — The rights and remedies provided by this title [§§ 1701 and notes-1720 of this title] shall be in addition to any and all other rights and remedies that may exist at law or in equity. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1414, 82 Stat. 596.)

1714. Investigations, injunctions, and prosecution of offenses. — (a) Whenever it shall appear to the Secretary that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title [§§ 1701 and notes-1720 of this title], or of any rule or regulation prescribed pursuant thereto, he may, in his discretion, bring an action in any district court of the United States, or the United States District Court for the District of Columbia to enjoin such acts or practices, and, upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Secretary may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the appropriate criminal proceedings under this title [§§ 1701 and notes-1720 of this title].

(b) The Secretary may, in his discretion, make such investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of this title [§§ 1701 and notes-1720 of this title] or any rules or regulation prescribed pursuant thereto, and may require or permit any person to file with him a statement in writing, under oath or otherwise as the Secretary shall determine, as to all the facts and circumstances concerning the matter to be investigated.

The Secretary is authorized, in his discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which he may deem necessary or proper to aid in the enforcement of the provisions of this title [§§ 1701 and notes-120 of this title], in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title [§§ 1701 and notes-1720 of this title] relates.

(c) For the purpose of any such investigation, or any other proceeding under this title [§§ 1701 and notes-1720 of this title], the Secretary, or any officer designated by him, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memorandums, or other records which the Secretary deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(d) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memorandums, and other records and documents. And such court may issue an order requiring such

person to appear before the Secretary or any officer designated by the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

(e) [Repealed.] (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1415, 82 Stat. 596; Oct. 15, 1970, P.L. 90-452, Title II, § 220, 84 Stat. 929.)

Amendment note. — Act Oct. 15, 1970, cited to text, repealed subsec. (e).

Cross reference. — Immunity of witnesses, see §§ 6001-6005 of Title 18.

1715. Administration. — (a) The authority and responsibility for administering this title [§§ 1701 and notes-1720 of this title] shall be in the Secretary of Housing and Urban Development who may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, hearing, determining, ordering, or otherwise acting as to any work, business, or matter under this title [§§ 1701 and notes-1720 of this title]. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department in compliance

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with sections 3105, 3344, 5362, and 7521 of title 5 of the United States Code. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(b) All hearings shall be public and appropriate records thereof shall be kept, and any order issued after such hearing shall be based on the record made in such hearing which shall be conducted in accordance with the provisions of the Administrative Procedure Act [5 § 551 et seq.]. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1416, 82 Stat. 597.)

1716. Unlawful representations. — The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1417, 82 Stat. 598.)

1717. Penalties. — Any person who willfully violates any of the provisions of this title [§§ 1701 and notes-1720 of this title] or the rules and regulations prescribed pursuant thereto, or any person who wilfully, in a statement of record filed under, or in a property report issued pursuant to, this title [§§ 1701 and notes-1720 of this title], makes any untrue statement of a material fact

or omits to state any material fact required to be stated therein, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1418, 82 Stat. 598.)

1718. Rules, regulations, and orders. — The Secretary shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon him elsewhere in this title [§§ 1701 and notes-1720 of this title]. For the purpose of his rules and regulations, the Secretary may classify persons and matters within his jurisdiction and prescribe different requirements for different classes of persons or matters. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1419, 82 Stat. 598.)

1719. Jurisdiction of offenses and suits. — (a) The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this title [§§ 1701 and notes-1720 of this title] and under the rules and regulations prescribed by the Secretary pursuant thereto, and concurrent with State courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title [§§ 1701 and notes-1720 of this title]. Any such suit or action may be brought to enforce any liability or duty created by this title [§§ 1701 and notes-1720 of this title]. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the

defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of title 28, United States Code. No case arising under this title [§§ 1701 and notes-1720 of this title] and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party. No costs shall be assessed for or against the Secretary in any proceeding under this title [§§ 1701 and notes-1720 of this title] brought by or against him in the Supreme Court or such other courts. (Aug. 1, 1968, P.L. 90-448, Title XIV, § 1420, 82 Stat. 598.)

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APPENDIX E — TITLE 18 UNITED STATES CODE §1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office of authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Publ. L. 91-375, §6(j) (11), 84 Stat. 778.

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APPENDIX F — TITLE 25 RULES AND REGULATIONS

PART I. DEPARTMENT OF ENVIRONMENTAL RESOURCES

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 71. ADMINISTRATION OF SEWAGE FACILITIES ACT

Authority

The provisions of this Chapter 71 issued under act of January 24, 1966, P.L. 1535, § 3, (35 P.S. § 750.3).

Source

The provisions of this Chapter 71 adopted August 2, 1971.

GENERAL

* * *

ABSORPTION AREA REQUIREMENTS

§ 73.61. General.

(a) When the percolation rate is over 60 minutes per inch, a subsurface disposal system as described in this Chapter shall not be used. Proposed alternate methods shall not be used unless approved by the Department.

(b) In every case, sufficient absorption area shall be provided for at least three bedrooms.

(c) Absorption area for standard trenches and seepage beds shall be computed as trench-bottom area.

(d) Absorption area for seepage pits shall be computed as effective sidewall area below the inlet.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1027

POCONO INTERNATIONAL CORPORATION AND CHARLES GOLDBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, a corporation and an individual, contend that the evidence was insufficient to sustain their convictions for mail fraud, selling lots not registered under the Interstate Land Sales Full Disclosure Act, and land sales fraud in violation of that Act. They also contend, as to the fraud convictions, that they were convicted for offenses not charged in the indictment.

Following a jury trial in the United States District Court for the Southern District of New York, each petitioner was convicted on seven counts of mail fraud (18 U.S.C. 1341), seven counts of land sales fraud (15 U.S.C. 1703(a)(2)), and six counts of sale of unregistered land (15 U.S.C. 1703(a)(1)).[1] Petitioner Goldberg

[1]As part of the counts of selling unregistered land, petitioner Pocono International Corporation was also charged and convicted of selling land without timely delivery of a Property Report (15 U.S.C. 1703(a)(.)).

was sentenced to concurrent 18-month terms of imprisonment on each of the six counts charging sale of unregistered land. He was placed on probation for four years on the remaining fourteen counts, with imposition of sentence suspended. The corporate petitioner was fined a total of $37,500.

1. Under the Interstate Land Sales Full Disclosure Act of 1968, 82 Stat. 590, as amended, 15 U.S.C. 1701 *et seq.*, it is unlawful for a developer or his agent to use interstate facilities[2] for the sale of lots unless the subdivision is registered with the Department of Housing and Urban Development. The subdivision is registered when a "Statement of Record" and a "Property Report" disclosing information describing the subdivision, its title, and other prescribed matters of interest to prospective purchasers, becomes effective. 15 U.S.C. 1703(a)(1),[3] 1705-1707. The Property Report, a required part of the Statement of Record (24 C.F.R. 1710.20(a) and (e)), must be furnished in advance to prospective purchasers. The registration becomes effective 30 days after filing, unless suspended by HUD for incompleteness or inaccuracy; if suspended, the Statement becomes effective 30 days after satisfactory correction. 15 U.S.C. 1706. Registration is effective only as to the lots specified in the disclosure statements. 15 U.S.C. 1703(a)(1).

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[2]There is no dispute that interstate facilities were used here.

[3]15 U.S.C. 1703(a)(1) provides in pertinent part:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails —
>
> (1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser * * * .

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2. The evidence is detailed in the opinion of the court of appeals (Pet. App. 3a-8a). In 1972 Pocono International Corporation (PIC) sold, through an agent, unimproved residential lots in a subdivision of Hickory Run Forest, PIC's development in Penn Forest Township, Pennsylvania. Petitioner Goldberg was PIC's chief operating officer and a principal stockholder in the company (Tr. 1039-1054).

As to the counts charging the sale of unregistered land to six purchasers, the evidence showed that petitioners sold lots to four purchasers before any Statement of Record had been filed for the subdivision involved; petitioners failed to furnish three of these purchasers with the required Property Report before the sales. Petitioners also sold lots to two other purchasers on the day of filing, thirty days before the registrations became effective. In addition, petitioner sold 125 other unregistered lots, of which 115 were sold prior to the filing of the Statement of Record (Pet. App. 4a-5a).

The fraud counts involved sales to seven named purchasers (seven counts charging violation of the mail fraud statute, and seven counts charging violation of the Interstate Land Sales Full Disclosure Act). The fraud arose from petitioners' representations that purchasers would be able to dispose of sewage by a conventional septic tank system at an average cost per lot of $600 (Pet. App. 6a-7a), and that this method "has been approved by the Penn Forest Township Supervisors under ordinance of the township and pursuant to rules and regulations and standards of Pennsylvania Department of Health" (Pet. App. 18a). The representations were made in the

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Statements of Record, the Property Reports[4] and oral statements made to three purchasers by salesmen (Pet. App. 6a; Tr. 812, 830-831, 843, 962). In fact, because of high water table conditions known to petitioners (Tr. 1061-1065), these seven lots were unsuited to conventional subsurface sewage disposal and required a more expensive special above-ground sand filter system known as a "turkey mound" (Pet. App. 7a; Tr. 687-694, 697-714). According to the policy and practice of the Pennsylvania Department of Environmental Resources and the local township in which the lots were located, no permit would be issued by the township for a turkey mound or other sophisticated septic system without prior state approval (Tr. 569-570, 785-787, 899-900, 906, 967-992, 1096-1099). This policy was known to the project engineer (Tr. 568-570), who had advised petitioner Goldberg that twenty percent of the lots had severe soil limitations requiring special systems which could be installed only with state approval (Tr. 416-417, 421, 424-426, 1061-1065).

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[4]The court of appeals found (Pet. App. 18a):

> The Property Report advised that the buyer could provide for sewage disposal by constructing a septic tank at an average cost of $600, which method, according to the developer's consulting engineer, "is acceptable for the subdivision under current state and local health regulations," that in some instances "additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank," bringing the total cost of sewage facilities to $1,200, that a permit must first be obtained from local authorities, that the buyer should first determine the availability of the permit from local authorities and that "[t]he developer has obtained a letter from the Penn Forest Township Supervisors that the use of septic tanks and other on-lot sewage disposal facilities will be approved for use in Hickory Run Forest subdivision upon issuance of a permit."

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3. Petitioners contend that they should not be subject to a criminal penalty for sale of unregistered lots because the evidence shows that their violation was not willful (Pet. 22-24). The court of appeals held, however, that the verdicts were sustained by the evidence (Pet. App. 15a). That evidence was ample to show that the violations were willful.[5]

In a successful high-pressure real estate operation, many lots may be sold in a short time. In the interval between the start of sales and a late filing, potential purchasers are without the disclosure Congress intended for their protection. Thus Section 1703(a)(1) (n. 3, *supra*) prohibits a land developer from using interstate facilities "to sell * * * *any* lot in *any* subdivision unless a statement of record with respect to such lot is in effect * * *" (emphasis added). Petitioners were fully aware of these requirements, since they had previously registered other subdivisions of Hickory Run Forest as required by the statute (Pet. 12). Nevertheless, they argue that their violations were merely an innocent late filing, because the subdivision was finally registered "only 78 days after the first sale charged in the indictment" (Pet. 24), and that, in consequence, the violations were not willful. This contention is inconsistent with both the letter and the purpose of the statute to assure that prospective purchasers of undeveloped land are informed "not only of the desirable aspects but also

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[5]In the court below, petitioners argued that the convictions for unregistered land sales must be reversed as to Goldberg because the evidence "was so weak as to be nearly insufficient to go to the jury" (Br. for Appellants, p. 49). The petition appears to present this argument with respect to both petitioners (Pet. 14). However the corporate petitioner did not present this argument below, and therefore it is not properly before this Court with respect to it. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

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of any undesirable aspects." S. Rep. No. 1123, 90th Cong., 2d Sess. 110 (1968). Moreover, the criminal sanctions in the statute would be seriously weakened if a developer who made substantial numbers of sales without effective disclosure statements on file could simply avoid criminal liability by late registration. Since "late registration" thus frustrates the statutory scheme, the jury was fully justified in finding willful violations, which are the intentional flouting of a known legal duty. Cf. *United States* v. *Bishop*, 412 U.S. 346, 360. Especially, is such a finding warranted where, as in this case, the record shows fraudulent representations in the sale of some of the lots and over a hundred sales prior to the filing of any Statement of Record (Tr. 1081).[6]

4. Petitioners also contend that the evidence was insufficient to sustain their fraud convictions.[7] They claim that the jury improperly found false their representations concerning the approval process for septic tanks and similar systems, because the jury relied on an erroneous interpretation of an allegedly vague regulation issued by the State Department of Environmental Resources (DER). Petitioners insist that their representations in fact

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[6]The evidence also shows that petitioner Goldberg was aware of the duty imposed by the statute. Subsequent to the commencement of sales efforts, which began as early as April 1972 (Tr. 1156), the project engineer, with Goldberg's knowledge and assistance, acquired plot maps and other documents for the unregistered lots, which Goldberg knew were a prerequisite to HUD registration (Tr. 113-117, 407-408). A broker hired by Goldberg to complete the HUD registration obtained the signature of the president of PIC on the Statement of Record, and a check for the HUD registration fee from Goldberg (Tr. 360-361). In addition, Goldberg personally handled correspondence related to the six sales which were the subjects of the registration counts (Govt. Exh. 45D, 46B, 52F, 56F).

[7]Only Goldberg raised this issue below.

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were based on an accurate recital of a letter to the developer from the local township supervisors. However, as the court below found, the district court's interpretation not only gave effect to the literal language of the regulations, but it was consistent with the purpose of the Pennsylvania Sewage Facilities Act under which they were issued. That purpose was to delegate to local officials the task of approving conventional septic systems under guidance of DER standards, while reserving approval of complex or experimental systems to the state agency (Pet. App. 10a-13a). Alternatively, as the court of appeals concluded (Pet. App. 13a-14a):

> In any event, defendants' convictions here do not turn solely upon the district court's interpretation of the foregoing regulations. Whether or not the regulations were vague or the DER's construction of them strained, appellants knew that DER had insisted in practice that its approval would be required for turkey mounds or similar exotic systems (such as aerobic tanks or evapo-transpiration beds), and that the Township, although it would issue permits for standard conventional systems, would not issue a permit for such unconventional systems unless DER approval had first been obtained. Nevertheless the defendants not only failed to advise the purchasers of the lots for which defendants were convicted that DER approval for turkey mounds or aerobic tanks would be required but falsely stated that "*This method of sewage disposal* [i.e., septic tanks costing approximately $600 each] *has been approved by the Penn Forest Township Supervisors*" and that the developer has obtained a letter from the Supervisors that "the use of septic tanks and other on-lot sewage disposal facilities *will be approved* for use in Hickory Run Forest subdivision upon issuance

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of a permit." (Emphasis supplied). In fact the method of sewage disposal utilizing septic tanks of the type that could be installed at a cost of $600 each had not been approved by the Township for the lots in question. Nor did the Township's letter to PIC (dated May 3, 1971) state that it would approve "the use of septic tanks and other on-lot sewage disposal facilities" of the type that might involve construction of a sand filter bed, much less that it would approve "turkey mounds." The Township's letter simply stated that it would approve septic tanks and other on-lot sewage disposal facilities for use in HRF "upon issuance of a permit under ordinance of this township and pursuant to rules, regulations and standards of the Pennsylvania Department of Health, all as required under the Pennsylvania Sewage Facilities Act." (A. 153). The letter amounted to nothing more than a statement that the Township would give whatever approval it was permitted to give under state and local law. Viewed as a whole this evidence together with the other proof, was sufficient to permit the jury to find the defendants guilty of the fraud charges.

The standard of review thus applied by the court below does not conflict with *United States* v. *Steinhilber,* 484 F. 2d 386 (C.A. 8). That case, a prosecution for willfully making untrue material statements in a Statement of Record, turned on its particular record.[8]

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[8]The availability of civil remedies does not, as petitioners argue, preclude the application of criminal sanctions. See, *e.g., Spies* v. *United States,* 317 U.S. 492, 495.

5. Petitioners contend that the indictment was constructively amended by a theory of fraud first postulated by the government at trial. Petitioners assert that the government's original theory claimed misrepresentations by petitioners to the effect that conventional subsurface septic tank systems could be installed, when petitioners knew that the lots involved in this case required additional subsurface corrective work. During trial, they claim, the government began asserting that petitioners knew that above-ground "turkey mound" systems were required. But as the court below found, "the term 'conventional system,' which significantly is used in the introductory part of the indictment, was defined at trial and understood by all parties to be merely a cryptic colloquial method of referring to the type of simple standard system *which would require only Township, as distinguished from DER, approval*" (Pet. App. 9a; emphasis supplied). This theory of fraud was consistent with the government's evidence, which showed that above-ground "turkey mounds" required state DER approval and were more expensive. Thus no new theory of fraud was added at trial; the fraud alleged was the fraud proved.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H BORK,
Solicitor General.

APRIL 1976.

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[9]The Court need not consider petitioners' claim (Pet. 14) that the evidence of land sales and mail fraud was sufficient to sustain only six valid counts as to PIC and three valid counts as to Goldberg. PIC did not raise this contention in the court of appeals, and, as to it, the claim therefore is not properly before this Court. (See n. 5, *supra*.) Goldberg was convicted on seven counts of land sales fraud and seven counts of mail fraud and received a suspended sentence on all fourteen. His case is thus appropriate for discretionary application of the concurrent sentence rule. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

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